



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 07, 2023

IN THE MATTER OF:

Appeal Board No. 629143

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed April 17, 2023 (), the Administrative Law Judge granted the employer's application to reopen A.L.J. Case No. 022-29778, overruled the employer's objection, and sustained the initial determination of eligibility.

The employer appealed the Judge's decision to the Appeal Board, insofar as it overruled the employer's objection and sustained the initial determination.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed full time as a sidewalk cleaner by the employer cleaning company for about 11 months. An employer policy, received by the claimant at hire, provided, in pertinent part, "Intimidation of any kind, such as threatening, retaliation, and workplace bullying will be reported to the authorities and result in termination."

About one month prior to September 18, 2022, the employer hired a new employee on the cleaning crew (SW), and the claimant soon began to experience problems with SW antagonizing her and having a difficult and disrespectful attitude. The claimant complained to her supervisor, LB, about these issues, and in response, LB usually tried to assign the claimant and SW to work on different sides of the street, to limit their contact with one another.

On September 18, 2022, the claimant and SW were assigned to work on the same side of the street. While the claimant was talking to LB about something, LB called SW over to the conversation, and a hostile verbal exchange occurred between the claimant and SW, with SW initiating the aggressive exchange. SW stated that he did not "have time" to listen to anything the claimant said, referring to her using a vulgarity, and also stated that if the claimant said anything to him again, he would harm her, again using multiple foul and offensive words. At one point, LW lunged at the claimant with a broom.

The claimant and SW never made physical contact with each other; LB told them to move to separate areas, and no authorities were called. The following day, the claimant was told that her employment was being terminated for fighting with a coworker while on duty, and threatening violence, in violation of the employer's policy. The claimant had received no warnings about engaging in threatening or hostile behavior during the period of her employment.

OPINION: The evidence establishes that the claimant was discharged from employment because the employer concluded that her conduct during an altercation with a coworker on September 18, 2022 violated the employer's "Zero Tolerance" policy prohibiting threatening behavior. However, this record fails to establish behavior by the claimant that constitutes disqualifying conduct for unemployment insurance purposes.

We are more convinced by the claimant's version of the September 18, 2022 events than by that of the employer's firsthand witness, LB. Specifically, we are persuaded by the claimant's credible, consistent, and specific description of the incident, including that SW was the initiator and aggressor in the exchange that took place. We note that the employer's firsthand witness provided no testimony to the contrary, stating that he did not recall who it was who made the first comment. The claimant also credibly testified that SW lunged at her with a broom, testimony that was not questioned or refuted by the objecting employer's representative or witnesses at the hearing.

Further, we find it significant that whatever exchange that occurred between the claimant and SW did not become physical. Under such circumstances, it is material that the claimant had no history of, or warnings about, using threatening words or behavior during her employment. It is also significant that the claimant's supervisor was aware of the history of conflict between the claimant and SW, yet placed them in close proximity on the day of the incident. Under the facts established by this record, we are not persuaded that the claimant's conduct disqualifies her from receiving unemployment benefits. Even if we credit the employer's account that the claimant responded to SW's vulgar and threatening remarks in kind, we find that her conduct, while perhaps a technical violation of the employer's policy, does not amount to misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

Finally, we note that the Court of Appeals cases cited by the employer in its appeal request are not relevant, much less controlling, since they are cases involving individuals' actions against Boards of Directors, and are not unemployment insurance cases. Appeal Board No. 619400, also cited by the employer, is factually distinguishable, since the claimant in that case initiated a sustained physical assault on her coworker.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is overruled.

The initial determination holding the claimant eligible to receive benefits, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER